

Steven R. Blackburn, State Bar No. 154797
Leslie J. Mann, State Bar No. 95467
Rachel S. Hulst, State Bar No. 197330
EPSTEIN BECKER & GREEN, P.C.
One California Street, 26th Floor
San Francisco, California 94111-5427
Telephone: 415.398.3500
Facsimile: 415.398.0955
SBlackburn@ebglaw.com
Lmann@ebglaw.com
RHulst@ebglaw.com

Attorneys for Defendant
Lucent Technologies, Inc.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, an agency of the State of
California,

Plaintiff, and

STEVEN J. CARAUDDO

Plaintiff-Intervenor

v.

LUCENT TECHNOLOGIES INC., and;
DOES 1 through 20,

Defendants.

CASE NO.: 3:07-cv-03747-PJH

**DEFENDANT LUCENT
TECHNOLOGIES' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PARTIAL MOTION TO
DISMISS FOR FAILURE TO STATE A
CLAIM IN WHICH RELIEF CAN BE
GRANTED**

[FRCP 12(b) (6)]

Hearing Date: April 16, 2008
Time: 9:00 a.m.
Courtroom: 3, 17th Floor

Judge Phyllis J. Hamilton

I. INTRODUCTION

The sole issue presented in this motion is whether the fourth cause of action for wrongful termination in violation of public policy Plaintiff-Intervenor Steven Carauddo's ("Carauddo") complaint is time barred. It is undisputed that Carauddo was terminated on January 27, 2006; he filed his complaint in intervention on February 20, 2008, more than two years after his

1 termination date. Since the complaint was not filed within the two year limitations period, the
2 claim must be dismissed with prejudice.

3 **II. PROCEDURAL HISTORY**

4 On June 27, 2007, the Department of Fair Employment and Housing (“DFEH”) filed a
5 Complaint alleging only statutory employment discrimination claims against Lucent, on behalf
6 of Carauddo, real party in interest. On July 19, Lucent answered the DFEH’s state court
7 complaint and on July 20, Lucent removed the complaint to this court on diversity grounds. On
8 August 7, the DFEH filed a motion for remand. On October 9, 2007, this court denied that
9 motion.

10 On November 5, Plaintiff-Intervenor Steven Carauddo filed a motion for leave to
11 intervene. Due to some procedural defects, Carauddo withdrew that motion and filed a new
12 intervention motion on November 27, noticed for hearing on January 30, 2008. Pursuant to this
13 court’s February 1 order, Carauddo’s motion was granted in part, permitting him to file his
14 complaint. On February 20, Carauddo filed his complaint in intervention (“CII”). In the CII,
15 Carauddo alleges a wrongful termination in violation of public policy claim as his fourth cause of
16 action.

17 Carauddo has never previously alleged this cause of action against Lucent in any court.

18 **III. FACTUAL STATEMENT**

19 Plaintiff alleges that on January 27, 2006, Lucent terminated Carauddo’s employment,
20 “purportedly because he was unable to perform the essential functions of his job.” CII ¶ 20.

21 **IV. CONCISE STATEMENT OF RELIEF SOUGHT**

22 Pursuant to Local Rule 7-4(a), Lucent defines the issue presented by this motion as
23 follows:

24 Whether the Fourth Cause of Action should be dismissed
25 with prejudice on the grounds that it is time barred by the two year
26 statute of limitations.
27
28

1 **V. ARGUMENT**

2 **A. PLAINTIFF'S FOURTH CAUSE OF ACTION FOR WRONGFUL**
 3 **TERMINATION IN VIOLATION OF PUBLIC POLICY SHOULD BE**
 4 **DISMISSED WITH PREJUDICE**

5 Mr. Carraudo's wrongful termination in violation of public policy claim must be
 6 dismissed from this case because it is time barred. Where the facts and dates alleged in the
 7 complaint indicate a claim is barred by the statute of limitations, a motion to dismiss for failure
 8 to state a claim lies because the action (or claim) is time-barred. *Jablon v. Dean Witter & Co.*
 9 614 F.2d 677, 682 (9th Cir. 1980); *ALA, Inc. v. CCAIR, Inc.* 29 F.3d 855, 859 (3rd Cir. 1994).
 10 Under California law, an action for wrongful termination in violation of public policy is subject
 11 to the personal injury statute of limitations. *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388,
 12 395 (9th Cir. 1998) quoting *Barton v. New United Motor Mfg. Inc.* 43 Cal.App.4th 1200, 1206
 13 (1996) (where "the primary nature of the right sued upon in a . . . wrongful termination action is
 14 personal," the one-year statute of limitations period applies); *Funk v. Sperry Corp.*, 842 F.2d
 15 1129, 1133 (9th Cir. 1998); *Lamke v. Sunstate Equip. Co.*, 387 F. Supp. 2d 1044, 1051 (N.D. CA
 16 2004). See *Acuna v. Regents of University of California*, 56 Cal. App. 4th 639, 646 (1997).
 17 Under current law, the limitation period for personal injury torts is two years. *Lamke, supra*, 387
 18 F. Supp. 2d at 1051. See Cal. Civ. Proc. Code § 335.1 ("Within two years: An action for assault,
 19 battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of
 20 another.").

21 Mr. Carraudo's claim accrued when he was injured – i.e., terminated on January 27,
 22 2006. *Lamke, supra*, 387 F. Supp. 2d at 1052. The Complaint asserting his wrongful
 23 termination in violation of public policy claim was not filed however, until February 20, 2008.
 24 Mr. Carraudo's filing was more than two years past his termination date.

25 No reason excuses his delay in filing. Mr. Carraudo could have filed this claim at any
 26 time. The common law claim of wrongful termination is not a claim that the DFEH could have
 27 filed. Cal. Gov't Code § 12965(b). Since the wrongful termination claim was not filed in the
 28 limitations period, it must be dismissed with prejudice.

1 **VI. CONCLUSION**

2 For the reasons set forth herein, Defendant respectfully requests that its partial motion to
3 dismiss be granted in its entirety, and that Plaintiff's fourth cause of action for wrongful
4 termination in violation of public policy be dismissed with prejudice.

5
6 DATED: March 11, 2008

EPSTEIN BECKER & GREEN, P.C.

7
8 By: /s/ Leslie J. Mann
9 Leslie J. Mann
10 Rachel S. Hulst
11 Attorneys for Defendant
12 Lucent Technologies Inc.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28